



Faculty Scholarship

1-1999

Codification and Right Answers

Andrew P. Morriss

Texas A&M University School of Law, amorriss@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>

 Part of the [Law Commons](#)

Recommended Citation

Andrew P. Morriss, *Codification and Right Answers*, 74 Chi.-Kent L. Rev. 355 (1999).

Available at: <https://scholarship.law.tamu.edu/facscholar/46>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

CODIFICATION AND RIGHT ANSWERS

ANDREW P. MORRISS*

Throughout the nineteenth century Americans regularly debated whether to reduce the common law to a written code. From Jeremy Bentham's 1811 letter to President James Madison offering to create a code that would free the United States from "the yoke of which in the *wordless*, as well as boundless, and shapeless shape of *common*, alias *Unwritten* law, remains still about your necks"¹ to Montana's adoption of four massive codes in 1895,² codification debates ranged across the country and the century.

Although the terms of the debate varied as widely as its geographic location, much of the debate concerned conflicting visions of what constituted right answers to legal questions. Code proponents argued that only by reducing the unwritten common law to a written code could the people be assured that there was a right answer to most legal questions. A code (as opposed to a mere statute) would provide a definitive, coherent, and systematic statement of the law. So long as the law remained scattered among thousands of potentially conflicting opinions, they claimed, knowing the law was impossible. Code opponents, on the other hand, rejected the claim that unwritten law was indeterminate. Not only did the common law provide right answers to legal questions, the code opponents contended, it was a superior means of creating right answers to a written code, which would actually increase indeterminacy in the law.

Although the nineteenth-century American codification debate is largely forgotten today, it engaged some of the best legal minds of the century. National figures like Joseph Story, Oliver Wendell Holmes, Jr., David Dudley Field, John F. Dillon, James C. Carter, U.S. Supreme Court Justice Samuel F. Miller, John Norton Pomeroy,

* Professor of Law and Associate Professor of Economics, Case Western Reserve University. A.B. (1981), Princeton; J.D., M.Pub.Aff. (1984), the University of Texas at Austin; Ph.D. (Economics, 1994), Massachusetts Institute of Technology.

1. Letter from Jeremy Bentham to President James Madison (Oct. 30, 1811), in 8 JEREMY BENTHAM, THE CORRESPONDENCE OF JEREMY BENTHAM 182, 182 (Stephen Conway ed., 1988).

2. See *infra* notes 67-71 and accompanying text.

and Charles Lindley wrote and debated the topic passionately and extensively. Prominent local legal leaders across the country devoted themselves to advocating for and against codification, giving public lectures, and writing pamphlets.³ Codifiers had some successes. The American Bar Association resolved in 1886 that “[t]he law itself should be reduced, as far as its substantive principles are settled, to the form of a statute.”⁴ Louisiana, Georgia, Dakota Territory, California, and Montana all adopted forms of code systems during the nineteenth century.⁵ While the code proponents failed to persuade Americans to replace the common law with systematic statutory codes, the creeping (or galloping!) growth of statutory law in this century may yet achieve their goal of displacing the common law, although without the accompanying systematization they sought.

Attempting to survey the entire sweep of the nineteenth-century American codification debate is well beyond the scope of this article.⁶ Here, I will concentrate on what I view to be the most interesting portion—the debate provoked by draft codes prepared by David Dudley Field for New York during the 1860s. Field’s drafts formed the basis for the codes ultimately adopted in Dakota Territory, California, and Montana as well as sparking years of often heated debate in New York.⁷

I concentrate on the debate over the Field Codes, to the exclusion of the successful codifications in Georgia and Louisiana and unsuccessful debates elsewhere,⁸ for four reasons in addition to the

3. See, e.g., Andrew P. Morriss, *Decius S. Wade’s The Common Law*, 59 MONT. L. REV. 225 (1998) [hereinafter Morriss, *Wade*] (reprinting and annotating lecture by prominent Montana judge and codification advocate); see also *infra* note 63 and the many pamphlets cited therein.

4. REPORT OF THE NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 74 (Philadelphia, Dando Printing & Publ’g Co. 1886) (noting that the vote was 58-41).

5. See Andrew P. Morriss, “*This State Will Soon Have Plenty of Laws*”—*Lessons from One Hundred Years of Codification in Montana*, 56 MONT. L. REV. 359, 364-65 (1995) [hereinafter Morriss, *Plenty of Laws*].

6. Codification was, of course, also a major issue in Europe, but I will deal only with the American debate here.

7. Because Field and his opponents were also influenced by Joseph Story’s 1837 report on codification to the governor of Massachusetts and because of Story’s prominence in American legal history, I also discuss his views.

8. Among other places, South Carolina, Kentucky, and Ohio had debates over codification. See, e.g., JOEL PRENTISS BISHOP, COMMON LAW AND CODIFICATION 5-49 (Chicago, T.H. Flood & Co. 1888) (address delivered before the South Carolina Bar Association); *Current Topics*, 6 KY. L. REP. & J. 2, 3 (1884-1885) (reporting unanimous vote of state bar association “to secure the appointment by the next Legislature of a commission to codify the laws of this State”); *Current Topics*, 31 ALB. L.J. 141, 141 (Feb. 21, 1885) (quoting a message to the Ohio legislature by Governor Hoadley of Ohio, “an earnest and able advocate of codification,” suggesting that “[i]f the whole body of the law of Ohio were reduced to writing

obvious space limitations. First, Field himself was by far the most persuasive and articulate advocate of codification in nineteenth-century America. Not only did his drafts and his views shape much of the debate, but Field tirelessly traveled New York, the country, and even the world promoting his views on codification of domestic and international law.⁹ He lobbied the New York legislature annually through the 1880s, pushed the issue at American Bar Association conventions, and kept up a ceaseless correspondence with lawyers around the country. His vision of codification and his proposals therefore dominated the debate during the last half of the century. Second, Field's primary opponent in the debate, James C. Carter, was the most eloquent and thorough of the anti-code writers.¹⁰ As the procode *New York Times* phrased it, "Mr. James C. Carter discusses the Field Code with a fullness of knowledge, a power of logical statement, and an unfailing candor which make him at once the most feared and the most respected of the code's opponents."¹¹ Third, the debate over Field's codes engaged many more than Field and Carter—it divided the New York bar "into two hostile camps"¹² and produced a seemingly unending stream of speeches and pamphlets and so provides a rich source of material. Fourth, the codification movements unrelated to Field,¹³ most importantly the successful ones in Georgia and Louisiana, possessed significant idiosyncrasies that make them difficult from which to generalize. Georgia's codification

and enacted into statutes, great progress would be made in giving to it accessibility and certainty, and in the economy of its administration").

9. See J. NEWTON FIERO, *DAVID DUDLEY FIELD AND HIS WORK* 5 (Albany, Weed-Parsons Printing Co. 1895) (describing Field's international codification efforts); Helen K. Hoy, *David Dudley Field*, in 5 *GREAT AMERICAN LAWYERS* 123, 169-72 (William Draper Lewis ed., 1908) (describing international codification efforts by Field).

10. Modern legal historian William Wiecek terms Carter the "epitome" of American lawyers at the end of the nineteenth century. See WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT* 97 (1998).

11. *The Code and The "Post"*, N.Y. TIMES, Feb. 18, 1887, at 4.

12. *Mr. Field Closes the Debate*, 21 AM. L. REV. 305, 305 (1887).

13. The earlier experiences of both Georgia and Louisiana provided code proponents with examples of the merits of codification, and the benefits of both code systems were put forward by code proponents. See, e.g., Alexander R. Lawton, *Codification*, 20 AM. L. REV. 17, 17 (1886) (giving the "opinion of an active practitioner in Georgia as to the value, based upon an experience of twenty years, of a code of the common law"); John Henry Wigmore, *Louisiana: The Story of Its Jurisprudence*, 22 AM. L. REV. 890, 890 (1888) (claiming that "[f]ew subjects so well reward attention as the unique position in American jurisprudence occupied by the law of Louisiana"). As far as I can determine, code opponents ignored Georgia. They dismissed the example of Louisiana, however, by claiming that it had avoided "[t]he defects so strikingly characteristic of French jurisprudence" through "the practical good sense" of judges and lawyers "[l]argely imbued with the principles and methods of the English Common Law." JAMES C. CARTER, *THE PROPOSED CODIFICATION OF OUR COMMON LAW* 65 (New York, Evening Post Job Printing Office 1884) [hereinafter CARTER, *PROPOSED CODIFICATION*].

was mingled with secession and Reconstruction,¹⁴ and Louisiana's mixed legal heritage and early adoption of a code made it unique.¹⁵

In this article I examine the views of code proponents and opponents about how to find right answers to legal questions. In Part I, I discuss why the codification debate remains important. I briefly outline the debate itself in Part II and present the code proponents' and opponents' arguments in Part III. In Part IV, I examine how both sides of the debate viewed the issue of whether right answers exist to legal questions. Finally, in the Conclusion, I summarize what I argue are the significant lessons from the codification debate that remain relevant today.

I. WHY A NINETEENTH-CENTURY DEBATE REMAINS RELEVANT

The codification debate was an important part of the American legal system throughout the nineteenth century. Both code proponents and opponents saw it as central to their creation of an *American* legal system. As California codifier Charles Lindley argued:

It is difficult to measure the importance of this great subject. Gathering together and arranging in logical order the fragmentary elements of a legal system, the reorganization and re-expression of a body of laws for a people, is an event that can have no parallel in magnitude in the history of that people. A Dictator may take the place of a President; a commune may sweep away the Dictator; still the great body of the laws remains substantially the same. The system that we *now* establish, will go down with succeeding generations, until a new race shall come, or until new conditions, wrought under the law of progress, shall make a new system necessary in one, five or twenty centuries.¹⁶

Thus, understanding the codification debate is an important part of understanding our legal history.

The codification debate is also worth considering today for reasons beyond its historical interest. The debate shaped modern legal thinking in several important ways. The debate over and the defeat of codification in New York, for example, played a significant role in shaping the American Law Institute's project to create the Restatements, with the American Law Institute regularly distinguish-

14. See Morriss, *Plenty of Laws*, *supra* note 5, at 372 n.52 (describing Georgia codification).

15. See generally Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971) (discussing background of Louisiana codification).

16. 1 CHAS. LINDLEY, CALIFORNIA CODE COMMENTARIES app. v (San Francisco, F. Sterrett 1874).

ing its activities from Field's earlier efforts.¹⁷ The Restatements in turn have played a significant role in the law of most states. California, one of the few states to adopt a civil code, is also one of the more influential states in many areas of the law and its codes significantly influence its jurisprudence. The other states which adopted codes based on David Dudley Field's drafts, the Dakotas and Montana, have also found their law affected by the presence of the codes.¹⁸

The codification debate is also important for another reason. Today we live in a legal environment increasingly built of statutes rather than common law. Environmentalists argued the common law's inadequacies justified the creation of complex statute-based regulatory regimes like the Clean Air Act.¹⁹ Business lobbyists, on the other hand, argued that state tort law regimes must be replaced by federal statutes to control runaway juries and spiraling costs.²⁰ Fifty years ago, in an essay on code proponent David Dudley Field's centenary, Roscoe Pound pronounced Field "an outstanding figure in the history of our law and an exemplar of the faith in conscious creative lawmaking which we have come to accept."²¹ Fifty years on that faith is somewhat tarnished by experience and by theoretical advances such as public choice theory. The codification debate suggests some of the reasons why we should care about whether the common law survives.

Finally, the codification debate tells us some important things about the common law and how to answer legal questions. Judges today treat the common law differently than did nineteenth-century judges. Modern judges tend to see their role as less constrained than did their predecessors, allowing them to introduce innovations in the law that would have been unthinkable a century ago. Revisiting the

17. See Herbert F. Goodrich, *Restatement and Codification*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 241, 241 (Alison Reppy ed., 1949).

18. See William B. Fisch, *Civil Code: Notes for an Uncelebrated Centennial*, 43 N.D. L. REV. 485, 486 (1967). See generally William B. Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N.D. L. REV. 9 (1968) (describing Dakota Codes' impact); Robert G. Natelson, *Running with the Land in Montana*, 51 MONT. L. REV. 17 (1990) (describing impact of code on real property law of covenants running with the land).

19. See Andrew P. Morriss, *The Politics of the Clean Air Act*, in POLITICAL ENVIRONMENTALISM (Terry Anderson ed., forthcoming 1999) (describing evolution of Clean Air Act).

20. See John C. Moorhouse, Andrew P. Morriss, & Robert Whaples, *Law & Economics and Tort Law: A Survey of Scholarly Opinion*, 62 ALB. L. REV. 667, 684-87 (1998) (describing tort reform efforts).

21. Roscoe Pound, *David Dudley Field: An Appraisal*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS, *supra* note 17, at 3, 8.

earlier approach allows us a new perspective from which to assess the modern view of the proper role of common law judges.

II. CODIFICATION IN THE UNITED STATES

Complaints about the inadequacy of the common law and existing state statutes predated the Revolution and continued with renewed force after Independence.²² Although none of these debates resulted in adoption of an American code, together with the development of the Code Napoleon in Europe, codification in Quebec,²³ and Jeremy Bentham's writings and correspondence with President Madison and various state governors,²⁴ they set the intellectual stage for the more serious consideration given the idea in the rest of the century.²⁵

Massachusetts was the first state to approach the subject seriously. In 1836, the governor established a commission, made up of Joseph Story and four others,²⁶ to evaluate the practicality of codifying the common law. The commission was asked to address three issues:

1. The practicability of reducing to a written and systematic Code the Common Law of Massachusetts, or any part thereof.
2. The expediency of such a reduction, if practicable.
3. The plan or plans, by which the same can be best accomplished, if expedient.²⁷

Story's commission produced a thoughtful analysis of the issues, writing an extensive report. The commission ultimately concluded that codification was possible in some, but not all areas, and desirable in some, but not all possible areas.²⁸ In presenting its conclusions, the commission's language was measured and its expectations of the resulting code modest, particularly compared to that of codification

22. See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 3-18 (1981).

23. See generally BRIAN YOUNG, *THE POLITICS OF CODIFICATION: THE LOWER CANADIAN CIVIL CODE OF 1866* (1994) (describing Quebec codification).

24. See COOK, *supra* note 22, at 98-99.

25. On the intellectual background of the codification movement, see Alison Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD: *CENTENARY ESSAYS*, *supra* note 17, at 17, 19-21.

26. See JOSEPH STORY et al., *Codification of the Common Law*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 698, 734 (William W. Story ed., Boston, Charles C. Little & James Brown 1852).

27. *Id.* at 698.

28. See *id.* at 715-16.

advocates in the second half of the century. "The Commissioners do not indulge the rash expectation, that any code of the known existing common law will dry up all the common sources of litigation. New cases must arise, which no code can provide for, or even ascertain."²⁹ Despite the Commissioners' limited endorsement of the concept,³⁰ or perhaps because of the daunting description they provided of the process necessary to produce a code,³¹ the Massachusetts legislature did not undertake any further steps toward codification.³²

Interest in codification took deeper root in New York, where the 1846 state constitution called for a code commission "to reduce into a written and systematic code the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practicable and expedient."³³ The 1846 constitution's code commission languished for several years, producing little before David Dudley Field was appointed to it in 1857. (In the interim, Field drafted the civil procedure code commonly known as the "Field Code." It was adopted in 1848.³⁴) Along with fellow commissioners William Curtiss Noyes and Alexander Bradford, Field set about drafting a complete set of codes for New York: a Political Code to include all the laws relating to government (draft published in 1859), a Penal Code to cover criminal law (draft published in 1864), and a Civil Code to cover private law (draft published in 1862).³⁵ After circulating the drafts to attorneys and judges throughout the state for comments, final drafts were published in 1860, 1865, and 1865, respectively.³⁶

All three draft codes included numerous changes in New York's

29. *Id.* at 725.

30. Both code opponents and proponents claimed Story as their own. *See, e.g.*, 3 DAVID DUDLEY FIELD, *Codification Once More*, in *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 411, 420 (Titus Munson Coan ed., New York, D. Appleton & Co. 1890) (noting that "Judge Story, with his associates . . . made a report to the Legislature of Massachusetts favoring general codification"); JOHN R. STRONG, *AN ANALYSIS OF THE REPLY OF MR. DAVID DUDLEY FIELD, TO THE BAR ASSOCIATION OF THE CITY OF NEW-YORK* 12-21 (New York, Henry Bessey 1881) (arguing Story opposed "universal codification").

31. *See* STORY et al., *supra* note 26, at 733-34 (noting need for "at least five commissioners, of high standing in the profession," "[m]uch time," "all the aids which can be obtained," "frequent meetings," "assistants, having extraordinary qualifications," "wide correspondence with members of the profession, in various parts of the United States," and a secretary "with a suitable compensation").

32. *See* STRONG, *supra* note 30, at 18-20.

33. COOK, *supra* note 22, at 190 (quoting N.Y. CONST. art. I, § 17 (1847)).

34. *See id.* at 191.

35. *See* Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238, 243-45 (1942).

36. *See id.*

laws, but the Civil Code was the most revolutionary declaring "there is no common law in any case where the law is declared by the five CODES."³⁷ The commission's reports were well received in New York—the *New York Times* praised the draft Civil Code as restating the principles of the law in a "clear and brief way" and, while cautioning against some of the code's changes in the law, concluded that consideration of the draft "is a great and important [work], and too much labor or thought cannot be bestowed upon it, nor can it be bestowed too quickly."³⁸ Because of the combination of the codes' radical changes and the disruptions of the Civil War, however, the commission's final reports "slept undisturbed in the limbo of legislative experiments" in New York until years later.³⁹

The New York Commission's reports circulated around the United States, and interest in them developed farther west. In Dakota Territory (present day North and South Dakota) copies of the draft codes "came into the possession of the Supreme Court of the Territory."⁴⁰ The judges were "favorably impressed by the codes," and "the bench and bar of the territory united upon recommending" repeal of the existing laws adopted in 1862 and adoption of the New York drafts in their place.⁴¹ The territorial legislature did so, without changing much in the Civil Code beyond substituting the word "Territory" for the word "State."⁴²

Field's efforts also found favor in California. That state's rapid growth and mixed legal heritage had left its statute law in a state of confusion. After several failed efforts at clarifying the statutes, the state established a code commission in 1870.⁴³ The commission granted itself a broader mandate, however, and relying on the 1865 New York drafts, produced versions for California in 1871.⁴⁴ After

37. N.Y. CIV. CODE § 6 (1865). The "fifth" code was the code of criminal procedure.

38. *The Civil Code*, N.Y. TIMES, Jan. 20, 1866, at 4.

39. ALBERT MATHEWS, THOUGHTS ON CODIFICATION OF THE COMMON LAW 6 (New York, Evening Post Job Printing Office 1882).

40. 1 GEORGE W. KINGSBURY, HISTORY OF DAKOTA TERRITORY: SOUTH DAKOTA, ITS HISTORY AND ITS PEOPLE 430 (George Martin Smith ed., 1915).

41. *Id.*

42. I did a line by line comparison of the provisions of the 1865 New York draft and the 1866 version adopted by Dakota Territory and found only 34 out of 2,034 sections changed beyond the Territory-State substitution and similar minor changes. Dakota's experience is the subject of my "in progress" manuscript tentatively titled "*The Bench and Bar United Upon Recommending*": *Dakota Territory's Experience with Codification*.

43. See Ralph N. Kleps, *The Revision and Codification of California Statutes 1849-1953*, 42 CAL. L. REV. 766, 768-71 (1954) (describing attempts to establish a code commission).

44. See *id.* at 772-73; see also 1 LINDLEY, *supra* note 16, app. ii ("The Commission, at my instance, went a little beyond what was contemplated by the Governor when he made the

extensive debate and revision, the codes were adopted in 1872.⁴⁵ One crucial change was the elimination of the Civil Code's abolition of the common law, although the result was to add to the confusion over where to find the law. This left California courts adrift with respect to the rules governing interpretation: "California judges wandered between expansive construction and traditional strict construction, lingering at every point in between—sometimes all in the course of the same opinion."⁴⁶

California undertook a far more extensive process of examination and reexamination than Dakota had and made more extensive changes in the codes' text⁴⁷ but there was still little real debate over the codes as codes. The state's newspapers from the period show little coverage of the code bills, particularly in comparison to other issues in the same legislature. For example, passage of the codes did not even merit mention in the *Sacramento Reporter's* summary of the legislative session. Even staunch code supporters found the process too rushed—Code Commission Chairman Charles Lindley resigned over the failure of the commission to adequately review the drafts, detailing his complaints in a letter he later published.⁴⁸

Both California and Dakota Territory found it difficult work to keep their codes current. California attempted to solve the problem by creating bodies to regularly revise the codes in light of subsequent statutory enactments.⁴⁹ Dakota found maintaining its codes sufficiently troublesome that it started over from scratch, creating a commission in 1875 to draft new codes and adopting new versions in 1877 based on the California codes.⁵⁰ As a nineteenth-century historian later noted, the copying of the New York drafts had left "many repugnant provisions" in Dakota's laws.⁵¹ Thus, the recodification was also an attempt to purge the codes of these provisions.

Back in New York, Field's codes revived in the 1870s and 1880s, largely due to the combination of Field's enormous wealth, political

appointments.").

45. See Rosamond Parma, *The History of the Adoption of the Codes of California*, 22 LAW LIBR. J. 8, 19-20 (1929).

46. Natelson, *supra* note 18, at 41.

47. Line by line comparisons of the California Civil Codes of 1871 (draft) and 1872 with the New York 1865 draft show extensive changes. These are the subject of my "in progress" manuscript tentatively titled *The Field Civil Code in California*.

48. See 1 LINDLEY, *supra* note 16, app. iv.

49. See Kleps, *supra* note 43, at 779-87 (describing various revision commissions).

50. See Morriss, *Plenty of Laws*, *supra* note 5, at 374-75.

51. Horace G. Tilton, *History of the Dakota Codes*, in 1 MONTHLY SOUTH DAKOTAN 90, 91 (1898).

influence, and vanity.⁵² Field saw his legacy to the ages in his codes. Gratifying as California and Dakota's adoptions of the complete set were, New York's failure to adopt more than his procedure code was galling.

Field explained the failure of the New York legislature to adopt his codes by pointing to its extensive record of special legislation. In 1873, he told the legislature that it had been so busy passing other legislation—346 bills in the 1871 session, a rate of nine per day—that the “chief reason” for the codes’ failure to pass was that the legislature “has had too much to do, or, rather, it has done too much else.”⁵³ Field tirelessly promoted the codes and kept them before the public eye so much that as early as January 1874 an editorial in the *Albany Law Journal* entitled *Codes* opened with the line “We beg the reader not to be alarmed by this hackneyed and familiar word.”⁵⁴

What finally prompted legislative action on the four codes was a revision commission headed by prominent lawyer Montgomery Throop, which proposed such extensive changes to the procedure code that it would no longer be recognizably Field's.⁵⁵ The first set of civil procedure code revisions proposed by Throop passed the New York legislature during the 1876 session but Field managed to block

52. Field had a high opinion of his talents, an opinion sufficiently shared by clients like William “Boss” Tweed and Jay Gould, which made him one of the wealthiest lawyers in the United States. See DAUN VAN EE, *DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW* 251-52 (1986). His representation of such figures had slowed the civil code's progress earlier—as the *New York Times* put it in 1882, to have allowed Field to draft the corporations law of the state while representing Fisk and Gould “would have been somewhat analogous to the hiring a Tombs ‘shyster’—interested in procuring the freedom of imprisoned scamps of various degrees of criminality—to codify the criminal laws of the State.” *A Code with a Purpose*, N.Y. TIMES, June 20, 1882, at 8.

The California version of Field's codes drew attention back in New York when they figured in a California man's successful evasion of bigamy charges through a clever construction of various code sections. See *The Man with Two Wives*, N.Y. TIMES, Jan. 25, 1874, at 3. When the outraged neighbors wrote to a California code commissioner about the problem, “[t]he codifier, who appears from his letter to be a much more sensible man than one would think, (judging only from the codes), wrote that it was a bad thing, and he didn't see what was to be done about it, but that the commission was not responsible for it; that all they had done was to copy the code of that eminent codifier, David Dudley Field,” and that if the legislature had wanted an original work they would have gotten someone more qualified and given them more time to produce it, see *id.*

53. *Mr. Field on the Codes*, 7 ALB. L.J. 193, 193 (Mar. 29, 1873). Code proponents elsewhere agreed. Lindley explained New York's failure to adopt Field's draft to Californians by noting “it is difficult in American states . . . to secure for [law reform] a patient hearing amid legislative scrambles for public plunder.” 1 LINDLEY, *supra* note 16, at 26.

54. *Codes*, 9 ALB. L.J. 33, 33 (Jan. 17, 1874).

55. See VAN EE, *supra* note 52, at 329-31; see also *Business in the Assembly*, N.Y. TIMES, Apr. 27, 1877, at 5 (noting that Field “appears to regard [Throop] as an interloper on a domain which belongs exclusively to David Dudley Field”).

the adoption of the second portion of the Throop proposals during the following sessions. Since the two sets of amendments were not designed to stand independently, this maneuver threatened to throw the procedural rules into a state of disarray. To gain Field's support for the full set of Throop proposals, revision proponents offered Field a bargain: If he would drop his opposition and persuade the governor to sign the procedure revisions, they would back passage of the Civil Code. Field accepted.⁵⁶ The legislature then adopted the Throop amendments and the Civil Code—with both houses passing the Civil Code “within two hours of a single day.”⁵⁷ The compromise came undone, however, a short time later when the governor vetoed both the Throop amendments and the Field Codes, calling for more careful study before making such a radical change.⁵⁸ As leading code opponent James C. Carter put it: “Never was the executive veto more beneficently employed; but it has only ‘scotched the snake, not killed it.’”⁵⁹ Partisans of the Throop revisions abandoned the deal the following session, successfully obtaining passage of the remaining procedure amendments without the Civil Code.⁶⁰ The Field drafts had been given new life, however, and became an annual issue in the legislature for most of the next decade.

While later legislatures adopted the Penal Code and portions of the Political Code, the crown jewel of Field's efforts, the Civil Code, never became law in New York. Although Field traveled to Albany for each session of the legislature, relentlessly revising the proposed Civil Code to meet objections and sometimes persuading one or more houses to pass code bills,⁶¹ he never won adoption of the Civil Code.⁶²

56. See *More Insurance Legislation*, N.Y. TIMES, Apr. 26, 1879, at 2. The entire Throop-Field controversy is described at some length in *A Code with a Purpose*, *supra* note 52, at 8.

57. LUCIUS ROBINSON, *Veto, Senate Bill, Not Printed, Civil Code* (Apr. 29, 1879), in PUBLIC PAPERS OF LUCIUS ROBINSON, GOVERNOR OF THE STATE OF NEW YORK 72, 73 (Albany, Argus Co. 1879); see also *More Insurance Legislation*, *supra* note 56, at 2.

58. See *The Governor's New Reasons*, N.Y. TIMES, Apr. 30, 1879, at 5. The governor noted “more than a hinted arrangement” concerning the Civil Code with “the voluminous and ill-assorted Code of Procedure.” ROBINSON, *supra* note 57, at 73.

59. CARTER, PROPOSED CODIFICATION, *supra* note 13, at 10.

60. See *Codifiers at Odds*, N.Y. TIMES, Feb. 1, 1880, at 6 (noting that Throop renounces deal); *The New-York Code Abroad*, N.Y. TIMES, Sept. 4, 1880, at 4 (noting that revisions passed).

61. As code opponent James C. Carter put it, “Two Legislatures have been found so insensible of the magnitude of the trust confided to them as to give their assent to the passage of a scheme of legislation called a ‘Civil Code,’ which, confessedly, few of them had even read, none had intelligently understood” CARTER, PROPOSED CODIFICATION, *supra* note 13, at 9.

62. I did line by line comparisons of the provisions of the various New York drafts, starting in 1862 through the last version introduced in the 1888 legislature and found that Field

Field's efforts in New York during the 1880s did spark a heated debate. Local legal periodicals such as the *Albany Law Journal* and newspapers including the *New York Times* frequently carried stories on Field and his opponents' efforts. National law journals such as the *American Law Review* published articles and symposia on codification. Both sides produced pamphlets,⁶³ sought endorsements from leading lawyers from around the world, pushed for resolutions, and launched vitriolic attacks on each other's partisans.⁶⁴ While members of the state legislature may never have focused on the details of the proposed civil code,⁶⁵ members of the legal profession argued both

extensively modified the draft Civil Code during this period. Field's efforts in New York are the subject of my "in progress" manuscript tentatively titled "*There is No Common Law*": *David Dudley Field and the Quest for a New York Civil Code*.

63. To give just one example of the debate, consider the following sequence: In 1883, James C. Carter, a member of the Bar Association of the City of New York's committee appointed "to urge the rejection of the proposed Civil Code" wrote a pamphlet entitled *The Proposed Codification of Our Common Law*. CARTER, PROPOSED CODIFICATION, *supra* note 13, at 3. The committee then had three thousand copies of this pamphlet printed and distributed "among the members of the Legislature and of the Bar of this City and State, and other persons interested in the subject." *Id.* Field responded with his own pamphlet DAVID DUDLEY FIELD, CODIFICATION OF OUR COMMON LAW: A SHORT REPLY TO A LONG ESSAY, FEBRUARY 18, 1884, reprinted in 2 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 494 (A.P. Sprague ed., New York, D. Appleton & Co. 1884). Field also persuaded leading lawyer Robert Ludlow Fowler to write a reply to Carter, published as a pamphlet entitled ROBT. LUDLOW FOWLER, CODIFICATION IN THE STATE OF NEW YORK (New York, Martin B. Brown 1884) which went through two printings.

64. Consider these examples drawn from just one series of insults. The procode (at that time) *New York Times*, for example, referred to one code opponent as the "commonplace son of a learned father." *The Code in the Assembly*, N.Y. TIMES, Apr. 8, 1885, at 4. Arguing against the code, one opponent alluded to Field's authorship by saying "A tree is known by its fruits. Pure air does not come from marshes." *Opposing Niagra Park*, N.Y. TIMES, Apr. 10, 1885, at 2. Another referred to Field as a "bird of evil omen." *The Civil Code Killed*, N.Y. TIMES, May 8, 1885, at 5. Similarly, an account of a bar association meeting in December 1885 on codification concluded by reporting Field's response to a speech by a code opponent who had said that Field had "an Achilles heel which I can reach": "When he talks of Achilles and an infirm heel, I challenge him." [More hisses.] "Is this the Bar Association?" asked Mr. Field. "I am ready to meet him anywhere, on any field, under any circumstances, and if he don't get enough then I will be sick." *Against the Civil Code*, N.Y. TIMES, Dec. 9, 1885, at 5. My own favorite set of insults from these debates is the labeling of code opponents as the "backwoods lawyers, the squires, the pettifoggers, and the local Dogberrys" by one member of the New York Legislature. *Governor Hill's Dilemma*, N.Y. TIMES, May 12, 1886, at 2.

65. The anti-code Association of the Bar of the City of New York suggested that few legislators paid attention to the details—it introduced its 1889 annual report on the issue by noting its surprise at the number of legislators who "although apparently ignorant of the character of the proposed Code" were nonetheless "inclined to relieve that Body from the pertinacious vitality of that measure by voting in its favor, as the only apparently available method of achieving that desirable end." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, EIGHTH ANNUAL REPORT OF THE SPECIAL COMMITTEE TO "URGE THE REJECTION OF THE PROPOSED CIVIL CODE," REAPPOINTED DECEMBER 11, 1888, at 5 (New York 1889) [hereinafter N.Y. BAR ASSOCIATION 1889 REPORT]. Even discounting for its source, it seems likely that few members of both houses of the legislature voting either way knew the details of the proposed Civil Code in any of the many votes in New York taken during the 1880s.

the specifics of Field's drafts and the overall merits of codification.⁶⁶

Field's drafts formed the basis for one more state's laws. In Montana Territory the combination of decades of partisan conflict, neglect, indifference, and mistakes made the territorial statutes a shambles.⁶⁷ After years of failed efforts at less grand revisions and discussion of codification, the territorial legislature finally created a code commission in 1889, shortly before statehood. Working from the California version of Field's drafts, the commission reported draft codes two and a half years later.⁶⁸ Like California's codifiers, Montana's codifiers omitted Field's section abolishing the common law and left the relationship between the common law and the codes to be sorted out by the judiciary.⁶⁹

The 1895 legislature, controlled by a new Republican majority in both houses, quickly passed the Codes with little debate and few changes from the commission proposals.⁷⁰ Another possible factor in their speedy passage was that a patronage scandal brewing over the legislature's hiring of less-than-competent, young, single, female "clerks" was averted by the need to copy out the massive code bills by hand to officially "enroll" them.⁷¹

Although the "debate" over the codes in Montana was marked primarily by the lack of opposition and blatant misrepresentations by code proponents about the lack of changes to existing law by the new codes,⁷² it did produce several significant contributions. Most impor-

66. See *infra* Part III.

67. See Morriss, *Plenty of Laws*, *supra* note 5, at 378-80.

68. The commission originally sought to have the codes considered by the 1893 legislature. That legislature deadlocked over the selection of a United States Senator, however, and so took no action on the proposed codes. See *id.* at 384-85.

69. Montana's courts have been largely unsuccessful in doing so, defeating the Montana codifiers' hope that the code would be a straightforward statement of the law. See Natelson, *supra* note 18, at 44 (noting that "Montana law, at least in the area of running covenants, has proved to be uncertain, inaccessible, and disharmonious"). James C. Carter commented on this feature of the Montana codes, whose sixteen thousand sections were "pretty well for a young State," by labeling it "simply digest-making." JAMES C. CARTER, ADDRESS OF JAMES C. CARTER AT THE ANNUAL MEETING, DETROIT, MICHIGAN, AUGUST 27, 1895, at 21, 22 (Philadelphia, Dando Press 1895) [hereinafter CARTER, PRESIDENTIAL ADDRESS].

70. The legislature changed only a few provisions, all of which directly related to its own power. For example, the legislature deleted a provision banning members from accepting free railroad passes and restored their own authority to choose the state's school textbooks, a provision a Montana paper referred to as a rich source of "boodle." Morriss, *Plenty of Laws*, *supra* note 5, at 391 & n.166 (quoting *Present Outlook*, DAILY MISSOULIAN, Jan. 27, 1895, at 1). A more detailed comparison of the Montana Civil Code and its sources in the California, Dakota Territory, and draft New York codes is the subject of my "in progress" manuscript, "Work of the Wise Men": *Codification in Montana*.

71. See Morriss, *Plenty of Laws*, *supra* note 5, at 395-97.

72. See *id.* at 388-89.

tantly, former Territorial Chief Justice and code commission member Decius S. Wade gave two speeches on codification subsequently printed as pamphlets. The first, given before the adoption of the codes, argued the case for codification.⁷³ The second, given after adoption of the codes, attempted to reconcile the common law with the codes.⁷⁴ In these pamphlets, Wade sketched out a distinctive view of the common law relevant to the issue of whether there are right answers to legal questions.

Across the United States and across the nineteenth century, the codification debate prompted Americans to consider many of the same issues we consider today when discussing the law. For example, whether the common law could be written down and, if it could be, whether it should be written down, were the central issues for both new states and older ones considering codes. Having briefly set out the factual circumstances of the debate, I now turn to the substantive arguments.

III. THE CODIFICATION DEBATE

The nineteenth-century codification debate covered a wide range of topics. Code proponents and opponents disputed virtually every aspect of the subject: the accuracy of particular provisions of draft codes,⁷⁵ whether codification was theoretically possible, and the relative merits of code and common law systems. Their disputes extended even to the terminology for the debate.⁷⁶ Because we are interested here in the implications of both sides' arguments for legal argument, I will concentrate on the most relevant issues.⁷⁷

73. See DECIOUS S. WADE, *NECESSITY FOR CODIFICATION: PAPER READ BEFORE THE HELENA BAR ASSOCIATION* (Helena, Williams & Sons 1894) [hereinafter WADE, *NECESSITY*].

74. See Decius S. Wade, *The Common Law*, Address before the Montana Bar Association (Feb. 1895), in *PROCEEDINGS OF THE MONTANA BAR ASSOCIATION* 173 (1914), reprinted in Morriss, *Wade*, *supra* note 3, at 235-71 (corrected and annotated version).

75. See, e.g., CARTER, *PROPOSED CODIFICATION*, *supra* note 13, at 98-110; FOWLER, *supra* note 63, at 67-68 (disputing whether the provisions on "General Average" (a set of relatively obscure maritime rules) were correct).

76. For example, Carter distinguished law as written or unwritten, titling his summation of the debate *The Provinces of the Written and the Unwritten Law*. Field, on the other hand, insisted that there was no longer any such thing as unwritten law, a relic of times when "the days were rude and the people illiterate" and that there was only "the law of statutes" and "the law of precedents." 3 DAVID DUDLEY FIELD, *Address Before the Law Academy of Philadelphia*, April 15, 1886, in *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD*, *supra* note 30, at 244, 246 [hereinafter FIELD, *Law Academy*].

77. I will not analyze the extensive historical arguments made by either side. For example, David Dudley Field argued that "no people, which has once exchanged an unwritten for a written law, has ever turned back" and that this proved "the superiority, beyond dispute or cavil, of written to unwritten law, of statute law to case law, or, as it might be better called, to

A. The Case for Codification

Code proponents made three primary theoretical arguments for codification: (1) The common law was uncertain because of the mass of conflicting precedent on many points; (2) The common law was difficult for individuals (particularly nonlawyers) to ascertain and this prevented them from learning the law; and (3) The common law inappropriately made judges into legislators. Let us briefly consider each of these arguments and the code opponents' responses.

Code proponents frequently noted the uncertainty caused by the common law's reliance on case law. Uncertainty was an "incalculable evil" that "makes it impossible for individuals so to conduct their life or their business as to be secure against unconscious violation of the law on the one hand, and the incurring of unknown liabilities and responsibilities on the other."⁷⁸ Reliance on precedent could not produce certainty: "as precedents may generally be found on both sides of the question," the law is rendered doubtful and uncertain.⁷⁹ Reporting on code opponent James C. Carter's legislative testimony in 1887, the *Albany Law Journal* was astounded by Carter's claims about the common law: "When Mr. Carter asserted that the common law is reasonably well settled, easily accessible, harmonious and fixed, he fairly took our breath away. Every lawyer at the table knew that it is no such thing, but that it is obscure, contradictory, inconveniently scattered and fluctuating."⁸⁰

Code opponents denied proponents' claim that the common law was uncertain. It was true, James C. Carter noted, that until the courts had "authoritatively spoken" on an issue "it may be said to be uncertain what the rule is."⁸¹ Statutes could eliminate this uncertainty, Carter conceded, although often at the expense of a just outcome in those unforeseeable future cases where the statute's solution would be inappropriate.⁸² The primary problem with a code was that statutes would bring new uncertainty through such cases because

guess-law." David Dudley Field, *Codification*, reprinted in 3 DAVID DUDLEY FIELD, SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD, *supra* note 30, at 238, 241 [hereinafter FIELD, *Codification*]. See generally Morris, *Wade*, *supra* note 3, for an analysis of the historical misstatements by one code proponent.

78. Edmond Kelly, *Codification*, 20 AM. L. REV. 7, 9 (1886).

79. WADE, NECESSITY, *supra* note 73, at 3.

80. *Current Topics*, 35 ALB. L.J. 81, 82 (Jan. 29, 1887).

81. CARTER, PROPOSED CODIFICATION, *supra* note 13, at 13.

82. *See id.* at 14.

the apparent meaning of the statute would not be accepted without a struggle. The ingenuity of lawyers would be employed to show that the statute could not have been designed, and therefore should not be construed, to embrace such cases, and, though they might seem, upon a hasty and superficial interpretation, to be covered by the language employed, yet that such interpretation must be discarded in favor of one more agreeable to justice. The difficulty would be felt in the same way by the judges.⁸³

Moreover, “[c]odes were peculiarly uncertain and unstable” because of “the immense amount of amendment which they invariably entailed, and of the methods in which amendments were invariably made.”⁸⁴

The size of lawyers’ libraries and the unmanageable number of precedents were further evidence to the code proponents of the unmanageability of the common law. “Surely, of the making of law books there is no end” complained Montana’s Decius Wade in 1894.⁸⁵ In more nuanced terms, the Story Commission concluded that the “vast deal of time [that] is now necessarily consumed, if not wasted, in ascertaining the precise bearing and result of various cases” could be saved by a code.⁸⁶ In an address to the Philadelphia Law Academy in April 1886, David Dudley Field summed up the problem, arguing that a code

is the only means of stopping the overflow of precedents, which bewilder and impoverish the lawyers of the country. The best estimate I have seen makes the number of decisions in the United States alone sixteen thousand a year. We live under the dreadful necessity of reading, or at least looking at, as many of these decisions as we can afford to buy, for if we do not it may happen that some more diligent and patient adversary searching for precedents may perchance to find one just in point, in some far-off State or country, and confound you with the specter, just as you thought your victory won.⁸⁷

83. *Id.* at 15; see also MATHEWS, *supra* note 39, at 27. Code opponents in New York also pointed to California law professor John Norton Pomeroy’s analysis of the California codes as evidence of the uncertainty created by Field’s drafts, reprinting his *West Coast Reporter* articles on interpreting the codes as a pamphlet in 1884. See JOHN NORTON POMEROY, THE “CIVIL CODE” IN CALIFORNIA 6 (New York 1885) (stating that “[t]here is hardly a section, whether it embodies only a definition, or whether it contains the utterance of some broad principle, or some general doctrine, or some single special rule, which does not require to be judicially interpreted”).

84. N.Y. BAR ASSOCIATION 1889 REPORT, *supra* note 65, at 12.

85. WADE, NECESSITY, *supra* note 73, at 9.

86. STORY et al., *supra* note 26, at 723; see also 1 LINDLEY, *supra* note 16, at 15 (noting that law is “found scattered, without order, through thousands of reports”).

87. FIELD, Law Academy, *supra* note 76, at 256. Similarly, the *Albany Law Journal* commented on Carter’s claim that the common law was “reasonably certain” saying that

Codes would not only eliminate the need to examine precedents, foreign and domestic alike, but improve the law. Opinions were “unfortunately burdened . . . with the wearisome utterances of many a common-place or indiscriminating official.”⁸⁸ Codes would “mitigate the prevailing evil of long dissertations in the shape of opinions” by cutting short “the interminable discussions of bench and bar alike.”⁸⁹ To illustrate his point, Field related how in a state with a code a lawyer “citing authority upon authority, piling Ossa on Pelion” was interrupted by opposing counsel pointing to a relevant code section, prompting the judge to state “Yes, that ends the discussion.”⁹⁰ Old precedent could thus be safely discarded; creation of new opinions would be drastically reduced.⁹¹

Nonsense, replied code opponents. If cases were not useful, “no one is compelled to use them; and, whoever wastes his time on them, may blame none but himself.”⁹² In fact, practice showed lawyers never found too many cases—each relevant opinion assisted analysis of the case at hand. Besides, they added, there was no reason to believe reliance on opinions would cease under the code as people sought to understand the code and future amendments to it.⁹³

The need for codification to make the law understandable to nonlawyers was also a frequent theme. Field summed this argument up in a brief 1886 article in the *American Law Review*, noting that

a word may be permitted upon the idea of the anti-code people as to what constitutes “reasonable certainty.” To waive, for the purpose of argument, the evident necessity of finding out the contents of the eight thousand volumes of judicial reports, and to adopt Mr. Carter’s measure of “reasonable certainty”—“four or five hundred volumes”—what should we say to a teacher of any thing else but law, who should tell the student that he could not know its rudiments except by consulting, all the time, four or five hundred volumes? We should regard it as a very uncertain science, should we not? But so wonted to their slavery have lawyers become, that they regard such a number of repositories as very moderate. We may add that if Mr. Carter is sincere in this statement, it is altogether probable that his practice does not conform to his theory. His private library probably has ten times that number, and he cannot depend even on that. There really is no “reasonable certainty”—unless, like brother Moak, one has sixteen thousand volumes, with the privilege of the State library in addition, and even then there is not.

Current Topics, 37 ALB. L.J. 145, 146 (Feb. 25, 1888).

88. FOWLER, *supra* note 63, at 17.

89. FIELD, *Law Academy*, *supra* note 76, at 256.

90. *Id.*

91. Joseph Story’s commission had not been so sure, noting that even in France, where the civil and commercial codes were “probably as perfect specimens of legislation as ever have been, or ever can be produced,” there were “many volumes of reports, and must constitute a continually augmenting mass of materials” dealing with questions on interpretation and unprovided for cases. See STORY et al., *supra* note 26, at 711.

92. MATHEWS, *supra* note 39, at 23.

93. See *id.* at 23-24.

"they who are required to obey the laws should all have the opportunity of knowing what they are. These laws are now in sealed books They can be opened by codification and only by codification."⁹⁴ The *New York Times* concluded in 1888, "We can put the argument for the code into three words: 'Publish the law.'"⁹⁵

Moreover, not only was the law scattered across statute books and court opinions, the common law was written in a format which nonlawyers could not understand.⁹⁶ Under the common law, code proponents argued,

[n]ot only does the law when discovered often take the shape of a sphinx riddle, but it is always set in the center of a labyrinth, the key to which has to be laboriously sought and the mazes of it with painful perseverance worked out, before the weary searcher can know whether he is to be rewarded by the revelation of a positive rule, or only end in being baffled by a conundrum.⁹⁷

Thus a "special committee" of the New York Chamber of Commerce recommended adoption of the civil code in March 1886, stating:

The committee believe that the law is meant for the affairs and business of men, and that its general principles can be perfectly understood by the exercise of ordinary common sense; and therefore that the chamber is both competent to have an opinion on this subject, and will be fully justified in expressing it. It is not a question whether we shall approve of the law as it exists, but whether we shall favor the expression of that law in clear and unmistakable terms, so that everybody may know what it really is.⁹⁸

Reducing the common law to clearly written principles and putting those principles into an organized framework, the codifiers argued, was the only way to make it accessible to the public.⁹⁹ Thus, the *New York Times* editorialized that the Civil Code was written "in a

94. FIELD, *Codification*, *supra* note 77, at 239; *see also* Alexander Martin, *Codification*, 20 AM. L. REV. 13, 14-15 (1886) ("For myself I would prefer to have no more judicial legislation. I prefer to have that function of our government performed by the department to which it belongs, under our American system.").

95. *A Reproach to the Bar*, N.Y. TIMES, Mar. 22, 1888, at 4.

96. *See* WADE, NECESSITY, *supra* note 73, at 2-3 (noting that people do not have necessary training to understand court opinions).

97. Kelly, *supra* note 78, at 10.

98. *Current Topics*, 33 ALB. L.J. 281, 282 (Apr. 10, 1886) (quoting New York Chamber of Commerce Report).

99. Montana's Decius Wade, for example, argued that

if a Justinian would codify the body of the common law, and thereby reduce it to such convenient form that its majestic principles of morality, reason and justice might be taught in the universities and schools, and so be brought to the homes and hearthstones of the people, its power over the minds and hearts of men, and its influence in uplifting humanity, and in calling into activity all the elements and forces that lead to noble lives, would be increased and magnified a thousand fold.

Morriss, *Wade*, *supra* note 3, at 266 (quoting Wade, *supra* note 74).

manner so systematic, upon a scheme so comprehensive, and in language so plain that the ordinary man can learn in half an hour nearly all that the best counsel can tell him upon any question of law included within it.”¹⁰⁰

Code opponents agreed that organization and arrangement could improve lay (and professional) understanding of the law—that was the function of treatises, they argued.¹⁰¹ If the law in a particular area was confusing, that merely provided the opportunity for an entrepreneur to provide clarity.¹⁰² In any event, every lawyer knew that “the points upon which he is now most frequently applied to for advice” concerned statutes, not the common law.¹⁰³ “[T]he native sense of justice existing in the breasts of all men gives them a better knowledge of unwritten law than they can ever attain of statutes”¹⁰⁴

Code opponents also objected that the written law would not be understood by many:

Let any gentleman not versed in the law read a part of this Code, and ask himself if he feels any more of a lawyer after he gets through; will he think that there is good meat in the nut, after he has cracked it, or that it is, as far as he is concerned, a hollow humbug? . . .

. . . [W]ho but a lawyer, and he an astute and learned lawyer, can attach their signification to those mysteriously suggestive but mute sections.¹⁰⁵

The code proponents had no patience with this argument: “Are we to wait for a code until an automatic one can be devised? Does any living man suppose omnipotence can frame a code which shall put

100. *The Code—Here and Else Where*, N.Y. TIMES, Feb. 28, 1885, at 4; see also WADE, NECESSITY, *supra* note 73, at 10 (noting that “there must be orderly system and arrangement as to subjects, sub-divisions and sections”).

101. See, e.g., STRONG, *supra* note 30, at 9 (stating “I submit that the Legislature appoint a commission of eminent gentlemen of the bar to prepare systematic and simple statements or text books” rather than codify the law).

102. Of course, the two sides also disagreed about which system would produce better scholarship. Under the common law, code advocates claimed, the constant fear that the law would change and “consign the monuments of his industry to the hieroglyphic and undecypherable cenotaphs of unknown times” kept the best lawyers from writing texts. *The Civil Code of the State of New York* (pt. 2), 2 ALB. L.J. 408, 409 (Nov. 26, 1870). On the contrary, the code opponents replied, “[b]old intellects will enlist with ardor in the strife, if the contest is to turn upon the weight of reason and argument, but abandon it with contempt, if it is to be decided by vote of a Legislature or a Board of Commissioners.” CARTER, PROPOSED CODIFICATION, *supra* note 13, at 91.

103. CARTER, PROPOSED CODIFICATION, *supra* note 13, at 92.

104. *Id.*

105. STRONG, *supra* note 30, at 4-6.

brains into a stupid man's head? Is the code proposed for the use of children, paupers, idiots, and Indians untaxed?"¹⁰⁶

Finally, code proponents argued that the common law made judges into legislators and so offended the American theory of separation of powers.¹⁰⁷ Field, for example, told his audience at one speech that "Some of us have heard this dialogue between counsel and judge: 'There is no precedent for this,' says the former; 'Then I will make a precedent,' says the latter."¹⁰⁸ Even when lawyers thought they knew the answer to a legal question, the *Kentucky Law Reporter and Journal* complained,

[W]e may find to our dismay a law maker in the place of the judge upon the bench, who, creating a new rule, which until then had no existence, applies it to a transaction entered into upon the faith of the law as theretofore expounded. But he could not do it if the old rule was written down in a statute, instead of an opinion.¹⁰⁹

Codes would restrict judges' lawmaking and so preserve the separation of powers.

Code opponents rejected this "shallow view"¹¹⁰ for several reasons. First, it was unimportant who made laws "for if the law thus made is the best, it matters not by whom it is made."¹¹¹ Second, judges were not free to make any rule they chose but were constrained by the common law.¹¹² Third, Field himself claimed most of his code was drawn from the common law: "As it comes from the judges, it is arbitrary and capricious; as declared and sanctioned by the codifier, it is scientific, true and worthy the acceptance of a State!"¹¹³

Given the advantages they claimed for the codes, how did code proponents explain the vehement opposition?¹¹⁴ They attributed it to

106. *The Code and Its Opponents*, N.Y. TIMES, Feb. 17, 1887, at 4.

107. See FIELD, *Codification*, *supra* note 77, at 239.

108. FIELD, *Law Academy*, *supra* note 76, at 254. The *New York Times* relayed a similar anecdote: "[A]n earnest debate over a decision occurred between two Judges, one of whom said to the other, 'I tell you this is the law,' and the other replied, 'It may be the law now, but it will not be the law after this case is decided.'" *Common Law Fetichism*, N.Y. TIMES, Apr. 19, 1886, at 4.

109. Wm. Reinecke, *Codification*, 5 KY. L. REP. & J. 867, 869 (1884).

110. CARTER, *PROPOSED CODIFICATION*, *supra* note 13, at 29.

111. *Id.*

112. See *infra* text accompanying note 148.

113. CARTER, *PROPOSED CODIFICATION*, *supra* note 13, at 40.

114. The question for code opponents was "why, if the facts really be as thus shown [as against codification], should any learned and scientific jurists be found to advocate the policy of codification[?]" *Id.* at 69. The primary English advocates of codification, John Austin, Sheldon Amos, and Sir James Fitzjames Stephens, Carter explained, disliked the lack of system in the common law because they were academic rather than practicing lawyers. See *id.* at 71. "Minds thus engaged naturally desire to see their science set down in books in the arranged and orderly

a combination of self-interest and ignorance. Lawyers preferred the law to be obscure, code proponents suggested, because its obscurity increased demand for their services.¹¹⁵ (Somewhat ironically, Field was one of the richest lawyers in America, earning more than \$75,000 a year through his representation of clients like Jay Gould and William "Boss" Tweed.¹¹⁶) For example, responding to a letter writer who was critical of the codes and who suggested that lawyers should determine whether New York should adopt them, the *Albany Law Journal* wrote:

[O]ur correspondent misses the real theory of statutes; they are not simply to enlighten the lawyers, but they are to instruct the community. The radical difficulty with our common unwritten law is that it can be found out, if at all, only by lawyers. We would have laws written so that the community may read and understand them¹¹⁷

More pointedly, the *New York Times* concluded an 1886 article by noting that "[t]he lawyers will never give [codification] to [the people.] What a soldier did for France the people must do for themselves here."¹¹⁸

Code opponents, on the other hand, saw Field's code as primarily attributable to his arrogance:

The cherished passion of the gentleman referred to for the enactment of a CIVIL CODE bearing his image and superscription has, it may be feared, survived his concern for the merits of the performance or its effect upon the public welfare. . . . [T]he sarcasm is not all hyperbole which has said that he would consent to strike

forms in which other sciences are found" *Id.* at 72. Bentham, while "a man of pre-eminent intellectual ability," was "not an experienced lawyer, or a safe guide upon any subject." *Id.* at 70.

115. See, e.g., *The Field Code Favored*, N.Y. TIMES, Apr. 14, 1887, at 8 (quoting a procode member of the Board of Trade and Transportation: "New York lawyers only consider how they can line their pockets at the expense of the merchants."); *Senators and the Civil Code*, N.Y. TIMES, May 6, 1884, at 4 (stating that "We are not sure that [lawyers opposed to the code] are not influenced in some measure by the fact that there is so much labor and difficulty to be paid for in extracting the living law from a mass of dead or raw material and so much chance for long contentions and varied litigation.").

116. See VAN EE, *supra* note 52, at 238-80, 293-310.

117. *Current Topics*, 29 ALB. L.J. 301, 301 (Apr. 19, 1884). Similarly the *Journal* had earlier argued that lawyers opposed codification because

it will certainly give the lawyers some trouble, and may possibly hurt their occupation in picking out the law as it is (or rather in guessing what it will be), from the reports and text-books, and advising their clients. That is the real reason, and avowed reason when the lawyers are candid.

Current Topics, 23 ALB. L.J. 241, 241 (Mar. 26, 1881).

118. *Enemies of the Code*, N.Y. TIMES, Apr. 12, 1886, at 4.

from the proposed *Civil Code* everything but its cover, if the Legislature would enact only *that*!¹¹⁹

B. The Case for the Common Law

As discussed above, the opponents of codification attacked the codes on a variety of grounds and contested the claimed virtues of the codes. But code opponents did not simply oppose codification; they also set out a positive case for the common law.¹²⁰ First, code opponents argued that the common law was elastic and flexible and so could adapt itself to new circumstances while statutes could not change without legislative action. Second, they claimed that the common law's "self-development" produced just rules.

The common law was elastic and statutes were not because "[o]ur common law is a particular system of reason" while statutes "are mere command."¹²¹ Courts laid down rules "*provisionally* only."¹²² In contrast, codes and statutes, based on a classification of facts before they occurred, produced fixed rules:

The essential nature of classification consists in *selecting* qualities of objects, and declaring that all which possess such qualities, whatever others they may exhibit, belong to the class. When, therefore, any case arises for disposition under a Code, if it present the features belonging to a class created by it, it must be dealt with the same as other instances in that class, no matter what additional and theretofore unknown features it may present, which ought to subject, and would have subjected, it to a wholly different disposition, had the new features been present to the mind of the codifier.¹²³

This elasticity was necessary because courts did not have the option of refusing to resolve the dispute underlying a common law case, as courts could in interpreting statutes concerning public law:

[I]f a controversy arise between two men concerning the ownership of property, and there be no statute upon the subject, the unwritten law *must*, nevertheless, decide it. No matter how novel the question, it must be determined. It would not be endurable that one man should hold unchallenged possession of property to which another honestly laid claim, for the reason that the case was so

119. CARTER, PROPOSED CODIFICATION, *supra* note 13, at 11-12.

120. The opponents' views have important intellectual connections to the German historical school of jurisprudence, of whom Friedrich Karl von Savigny is the most famous. One of Savigny's pupils, for example, was a teacher of James C. Carter. See Pound, *supra* note 21, at 5. Exploring those connections is beyond the scope of this article.

121. BISHOP, *supra* note 8, at 3.

122. CARTER, PROPOSED CODIFICATION, *supra* note 13, at 25.

123. *Id.* at 32.

novel as to render it difficult to determine to whom it justly belonged. Society may leave a criminal unpunished; private citizens do not feel an additional burden on this ground; but it cannot leave private controversies undecided, or to be decided by force.¹²⁴

An example will help clarify the role code opponents saw for elasticity. Consider a judge confronted by a contract made by an infant; the judge would assign it to the class of voidable contracts. When confronted with a new situation, a contract made by an infant but ratified after the infant reached legal age, the judge would first determine whether the new feature (ratification) was a material one which justified moving the contract from the voidable class to a new class. The first judge to confront this problem had no precedent to guide him, but was obliged to determine the issue himself. "And what was the real problem which he had to solve? Simply this: what does justice require? He was to apply to the case the social standard of justice; not simply to repeat what had been done before, but to make an original application of it."¹²⁵

Elasticity was not indeterminacy. Code opponents believed strongly that the existing common law restrained judicial innovation.¹²⁶ Indeed, code opponents also claimed that the common law was simultaneously more stable as well as more elastic than statutes.¹²⁷

Some code proponents agreed that the common law's elasticity was important. Joseph Story, for example, argued that codification need not reduce this important advantage of the common law "to a hard and unyielding" character if proper rules of interpretation were included.¹²⁸ Some claimed codes could also be elastic.¹²⁹

124. *Id.* at 34-35.

125. JAMES C. CARTER, *THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW* 26 (New York & Albany, Banks & Bros. 1889).

126. *See infra* text accompanying note 148.

127. *See* CARTER, *PROPOSED CODIFICATION*, *supra* note 13, at 83 ("Next to absolute *right*, stability is the chief excellence in jurisprudence.").

128. *See* STORY *et al.*, *supra* note 26, at 720.

129. Fowler, for example, argued:

The administration of law is usually a struggle to include the contested case within a certain law, whether that law has emanated from the superior legislative body, or from the inferior legislative body—the judiciary. The interpreting function of a court is always restrictive or extensive, and if it err in the performance of this function, the proper checks still exist by means of appeals. Because of codification, the judicial operations do not change: with a fearless bar and an intelligent judiciary, there will be in the future, as in the past, the same effort to arrive at exact justice, the same effort to distinguish the given case and possibly as great a proportion of error, though it is thought not.

FOWLER, *supra* note 63, at 15; *see also* 1 LINDLEY, *supra* note 16, at 13 ("A rule of the Common Law, when expressed *verbatim* in a statute—a legislative sanction—cannot have less elasticity by reason of such expression."); *Codes and Reports*, N.Y. TIMES, Apr. 5, 1887, at 4 ("When new

Others rejected the idea of elasticity altogether. Field, for example, scornfully noted that "It does not take a 'Philadelphia lawyer' to detect the fallacy" in claims of elasticity.¹³⁰ "A changeable law is no law at all. You may call it what else you please, but it is not a rule for the guidance of intelligent beings who wish to make their conduct square with the laws of the land."¹³¹ Similarly, C.B. Seymour complained in the *Kentucky Law Reporter and Journal* that "[t]he boasted element of elasticity is simply uncertainty. Every settled doctrine of the law ought to be incorporated into a statute, so as to be put out of the reach of the courts as far as possible."¹³²

The code opponents believed that the gradual evolution of the common law was a crucial feature. The private law was "the application by the courts of the national standard of justice to the business and dealings of men. This national standard of justice . . . is the product of the combined operation of the thought, the morality, the intellectual and moral culture of the time."¹³³ The gradual evolution of this standard is a crucial part of the common law. Code proponents, James C. Carter argued in his 1895 presidential address to the American Bar Association,

do not always sufficiently remember that so far as respects the ordinary doctrines of the common law, an innumerable host of cultivated human intellects, many of them of transcendent ability, have been studying and reflecting for a thousand years upon what is just, fit, and expedient in all the ordinary affairs of life. The final conclusions reached by this process are not likely to be amended by the work of a few revisers giving comparatively brief attention to each particular topic.¹³⁴

A few code proponents saw little need for further legal developments. Montana's Decius Wade, for example, argued: "In this age of the world the discovery of new principles of law is rare, but

cases arise common law Judges decide them upon legal analogies by a consideration of the principles governing all cases nearest similar, and with due regard to the 'national standard of justice.' That is what the Code Napoleon directs Judges administering it to do, while the Prussian Code directs new cases to be reserved for legislative action. As regards new cases codes are at no disadvantage, while as regards the immeasurably greater number of cases under old law they give advantages . . .").

130. FIELD, *Law Academy*, *supra* note 76, at 253.

131. *Id.*; see also Martin, *supra* note 94, at 15 (courts are "incapable of lifting case-made law out of its settled grooves, or changing its rules, without arrogating to themselves the right of legislation").

132. C.B. Seymour, *Codification*, 5 KY. L. REP. & J. 870, 871 (1884); see also John F. Dillon, *Codification*, 20 AM. L. REV. 29, 47 (1886) ("What is well settled, *can* be expressed, and what is doubtful, *ought* to be made certain, by legislative enactment.").

133. CARTER, PROPOSED CODIFICATION, *supra* note 13, at 86.

134. CARTER, PRESIDENTIAL ADDRESS, *supra* note 69, at 24.

there is a constant application of old principles to new facts and conditions.”¹³⁵ Most, however, agreed with code opponents that changes in the law would continue. David Dudley Field, for example, told an 1886 audience that “Who can tell what may yet happen? There may be new developments of property, new social relations, new phases of personal rights. The marvels of this generation may be supplanted by greater marvels in the next.”¹³⁶ Beneficial legal changes to handle these changed circumstances came, code proponents argued, from the legislative process, not from the common law:

The careful student of history will find that from the time when the English judges resisted the negotiability of the notes of merchants down to the hour when the last shackle was stricken from the hands of woman in the holding of her own property and taking the fruit of her own labor, the real and healthy growth of the law has proceeded not from the seats of judges, but from the halls of legislative assemblies.¹³⁷

The code proponents also differed from the code opponents in the conclusions they drew from the prospect of change. A code would allow us to “declare the law of what has been and now is, say that it shall continue to apply to the same experiences, in the same circumstances, affirm those general principles which are unchangeable and immortal, and leave the rest to the incoming ages.”¹³⁸ Moreover, code proponents vigorously contested the justice of the common law process, often quoting Jeremy Bentham to make their point:

‘Do you know how Judges make the common law,’ asks JEREMY BENTHAM. ‘Just as a man makes laws for his dog. When your dog does anything you want to break him of you wait till he does it, and then beat him for it. This is the way the Judges make law for you and me.’¹³⁹

C. Summary

As this brief review suggests, the two sides disagreed about almost everything over the course of the codification debate. The debate revealed sharp differences about what constituted proper legal argument. To code advocates, the law was (or ought to be) a coherent

135. Ex-Chief Justice [Decius S.] Wade, *The Bench and Bar . . . : 1880-1894*, in JOAQUIN MILLER, *AN ILLUSTRATED HISTORY OF THE STATE OF MONTANA* 634, 670 (Chicago, Lewis Publ'g Co. 1894).

136. FIELD, *Law Academy*, *supra* note 76, at 249.

137. *Id.* at 254.

138. *Id.* at 249.

139. *Common Law Fetichism*, *supra* note 108, at 4.

system of principles, stated clearly and concisely and systematically arranged. Faced with a question about the law, even a nonlawyer should be able to reason out the answer by determining which of the code's principles applied. There is little distinctly legal about such an analysis, apart from the reliance on a book of legal principles to frame the analysis. Indeed, their insistence on the superior nature of codes for lay readers made it clear that most code advocates did not see the analysis as distinctive from other forms of logic.

The admirers of the common law, on the other hand, emphasized the common law process over the substantive rules. Their view of legal argument emphasized the distinctively legal nature of the analysis. Bishop assured his audience that legal reasoning "is a distinct thing from the personal reasoning of an individual judge or text-writer."¹⁴⁰ Rules were provisional only (except for identical cases), and the process of distinguishing cases produced the gradual evolution of the common law system. While dismissing code proponents' claims about the vastness of precedent that needed to be consulted as exaggerated, code opponents saw no problem with requiring lawyers to consult numerous case reports when necessary. It was the process of classifying the facts through the examination of precedent that would guide the result.

IV. LEGAL ARGUMENT AND THE CODIFICATION DEBATE

Two issues concerning legal argument (as opposed to the more theoretical points) stand out from the codification debate. First, there was a fundamental disagreement over whether codification was possible that centered on different views about the existence of right answers to legal questions. Second, the two sides held radically different conceptions of what constituted a right answer.

A. Was Codification Possible?

Code proponents and opponents disagreed not only on the relative merits of codes and the common law but even on the basic issue of whether codification was possible. At one level, code proponents pointed to European codes and appealed to national pride as proof. David Dudley Field, for example, asked an audience in 1886 why it was "[n]ot possible to form a code of American common law[?] Are we inferior to Frenchmen, Germans, or

140. BISHOP, *supra* note 8, at 11.

Italians?"¹⁴¹ The *New York Times* told its readers in 1886 that "[i]n most of the effete monarchies a citizen can buy for a shilling or so an authoritative declaration of the rules to which Judges must conform in deciding disputes between citizens. An American wishing to be equally well equipped must purchase some fifty thousand volumes" and hire a lawyer to interpret them.¹⁴²

More importantly, codification was possible, code proponents argued, because

very many principles of the common law have, by decisions of the courts, become fixed and settled beyond dispute. This being so, what valid objection can there be to collecting these principles together, from the unwieldy mass of reports, and enacting them into statutes clothed in plain and simple language, and made accessible to all?¹⁴³

Indeed, they argued

that all case-made law, to be justly entitled to the name of law, must contain rules or principles which can be applied to the solution of future cases. If it does not contain such rules or principles, then it is no law at all—but only a chaotic mass of arbitrary opinions.¹⁴⁴

This misunderstood the nature of case law, according to code opponents. A letter on the topic in the *New York Times* in 1881 captures the anti-code position. "J.R.S.," who was critical of the code, wrote:

The result of writing law in a statute is that instead of construing the principles of a given case you construe the words of the statute. The law as it is at present understood and practiced is a living body of principles, applied with all the earnestness and fidelity of which humanity is capable to endlessly modifying cases; by writing it

141. FIELD, *Law Academy*, *supra* note 76, at 252; *see also Mr. Field Closes the Debate*, *supra* note 12, at 309 ("But, say our objectors, the Anglo-Saxon race is different from other races, no people that had the vitality of the Anglo-Saxon ever made a code. What do you say of the vitality of our friends of Louisiana? Is it that because they are partly French and partly Spanish, with a great admixture of English and American, therefore they can bear a code, whereas the sturdy Anglo-Saxon cannot!") (quoting David Dudley Field)).

142. *How to Get a Code*, N.Y. TIMES, Apr. 26, 1886, at 4. Code opponents responded in kind in 1887 testimony before the New York legislature, where Carter ridiculed the letters of support Field had offered from European law professors. "Are we to go to the nations of Europe and ask what laws we should have in the State of New York?" JAMES C. CARTER, ARGUMENT OF JAMES C. CARTER IN OPPOSITION TO THE BILL TO ESTABLISH A CIVIL CODE, BEFORE THE SENATE JUDICIARY COMMITTEE, ALBANY, MARCH 23, 1887, at 7 (1887) [hereinafter CARTER, TESTIMONY]. Indeed the whole idea of codification, Carter wrote, was "an attempt to subject the growth and development of popular institutions to forms borrowed from countries despotic in present character, or historical origin." CARTER, PROPOSED CODIFICATION, *supra* note 13, at 24; *see also* BISHOP, *supra* note 8, at 48 ("Did you ever consider how seldom is an anarchist, or a curser of all government, born and bred in a country governed by the common law?").

143. WADE, NECESSITY, *supra* note 73, at 4.

144. Martin, *supra* note 94, at 13.

down it is limited to the formulas in which it is stated; it is no more easy of application to the variety of cases than before, even if it be, which is next to an impossibility, exactly written . . . It is much as if a man were to try to annihilate his common sense and live by a book of behavior.¹⁴⁵

Carter similarly termed the assumption "that unwritten law is *thus known*, and that the memorials of it lie in the opinions of the courts" as "false and delusive."¹⁴⁶ All an opinion contains, and so all that is "truly known is, that certain actually occurring instances have been decided in certain ways. These are the facts and the only facts."¹⁴⁷ But "law not *known*" was not the same as "law not existing":

It is a shallow view which regards law thus declared by the courts as *made* by them. The function of *making* law supposes in the body which exercises it freedom of action. Existing rules are of no binding force upon it. It can follow or disregard them according to its own views of policy and wisdom. But the judge is never thus *free*. He is bound, in declaring the law of a new case, by established rules just as much as in deciding a case which has been decided a hundred times before. The law of a new case can be determined by him only by building upon the foundation of law already known and declared. His office is to apply the existing *standard of justice* to the new exhibition of fact, and to do this by ascertaining the conclusion to which right reason, aided by rules already established, leads. There is no arbitrary power in him; and any exercise of it by him would form clear ground for his impeachment.¹⁴⁸

The Story Commission report to the Massachusetts legislature captured the difference between the two sides. Was codification possible? If codification

is to be intended not only all the general principles of that law, but all the diversities, ramifications, expansions, exceptions and qualifications of those principles, as they ought to be applied, not only to the past and present, but, to all future combinations of circumstances in the business of human life, it may require one answer. If, on the other hand, those terms are to be understood in a more restricted sense, as importing only the reduction to a positive code of those general principles, and of the expansions, exceptions, qualifications and minor deductions, which have already, by judicial decisions or otherwise, been engrafted on them, and are now

145. Letter to the Editor, *Mr. Field's Code: No Unfailing Guide to the Devious Ways of the Law*, N.Y. TIMES, Feb. 13, 1881, at 5. This letter provoked a response by "H.D." two weeks later that argued that "[c]odification will render the principles of the law certain and quickly ascertainable." Letter to the Editor, *The Necessity of Legal Codification*, N.Y. TIMES, Feb. 28, 1881, at 2.

146. CARTER, PROPOSED CODIFICATION, *supra* note 13, at 28.

147. *Id.*

148. *Id.* at 29-30.

capable of a distinct enunciation, then a very different answer might be given.¹⁴⁹

Yet Story, like the later code opponents, clearly thought right answers would exist even where no positive enactment or on point decision existed. If a complete code, as he described it above, were attempted and courts were forbidden to do more than apply the text of the code, then

every case of wrong and injustice and oppression, not thus foreseen and provided for, would be wholly remediless. And the mass of such cases would be perpetually accumulating, since positive legislation, however rapid and constant, can never keep up in any just proportion with the actual permutations and combinations of the business of an active, enterprising, and industrious people.¹⁵⁰

Code opponents also warned against the dangers of relying on legislatures to produce codes. James C. Carter, for example, argued:

There are large numbers in all free societies with whom lawmaking amounts almost to a passion. Legislation is the source of so many advantages that many fall into the error of thinking that it is a blessing *in se*, and not, what it more correctly is, a choice among evils, and it is so easy among us to procure the passage of laws which do not immediately conflict with some private interests that many find pleasure in the work, and fancy when engaged in it that they are public benefactors in devoting their time and talents to this form of public service. In our legislatures, too much engrossed with party and personal schemes, it is not difficult to induce acquiescence in proposals for new laws which are plausibly presented. The statement of expected benefits is received with easy credulity. Little inquiry is made concerning the possible mischiefs which may follow from the adoption of a proposed measure, and if no one offers energetic opposition it is apt to pass. It is here that the ambitious experimenters and reformers, not to say *cranks*, find their opportunity, and they are never satisfied until their whims are enacted into law.¹⁵¹

Code proponents had a number of responses to this argument but they all ultimately rested on Field's brilliance and ability. For example, conceding "[i]t would have been a strange lack of judgment" on the part of the Montana code commission "if they had supposed that the whole body of the common law could be reduced to the form of a statute in two and a half, or in ten years," code commissioner Decius Wade explained the commission's speed by noting their reliance on Field, "one of the most eminent lawyers of

149. STORY et al., *supra* note 26, at 706.

150. *Id.* at 708.

151. CARTER, PRESIDENTIAL ADDRESS, *supra* note 69, at 45.

this age, and whose definitions and powers of classification were never surpassed.”¹⁵²

B. Right Answers

As noted above, code proponents and opponents agreed that there were right answers to legal questions, disagreeing over whether the common law or codes provided such answers. Both saw the law as made up of universal principles but disagreed over the consequences of the existence of such principles. Early in the New York debate, the procode *Albany Law Journal* contended that “[t]he whole world is not only capable of being governed by the same code, but ought to be so ruled.”¹⁵³ Responding to calls for more uniform state laws on the other side of the debate, James C. Carter noted that “[o]ur unwritten law is already substantially the same, and that I have always regarded as an impressive reason for abstaining from any attempts to reduce it into written forms, which would at once (being made different by legislatures) tend to plunge it into diversity.”¹⁵⁴

The codification advocates’ vision of the law was summed up in the Montana debate by prominent Montana lawyer Col. Wilbur F. Sanders:¹⁵⁵

[A] citizen of Montana, who has but little money to spend on books, needs to have lying on his table but three: an English Dictionary to teach the knowledge of his own mother tongue; this Book of the Law [the Codes], to show him his rights as a member of civilized society; and the good old Family Bible to teach him his duties to God and to man.¹⁵⁶

The choice of the dictionary and Bible to frame the code captures the code proponents’ view of the law¹⁵⁷—law was something

152. WADE, NECESSITY, *supra* note 73, at 13-14.

153. *The Civil Code of the State of New York* (pt. 2), *supra* note 102, at 410.

154. CARTER, PRESIDENTIAL ADDRESS, *supra* note 69, at 51.

155. Sanders had a fascinating career in Montana, serving in the 1864 vigilance committee that broke the reign of Sheriff Henry Plummer, as a U.S. Senator from Montana, as head of the Montana Historical Society, and in a variety of state legal positions. See Andrew P. Morriss, *Miners, Vigilantes, & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 LAND & WATER L. REV. 581, 642-44 (1998) (describing Sanders’ role in vigilante activity); Dave Walter, *Wilbur Fisk Sanders*, MONTANA MAG. Jan.-Feb. 1984, at 58 (describing Sanders’ career).

156. HENRY M. FIELD, THE LIFE OF DAVID DUDLEY FIELD 91 n.* (New York, Charles Scribner’s Sons 1898) (quoting Wilbur F. Sanders).

157. Field used the dictionary metaphor. See, e.g., FIELD, Law Academy, *supra* note 76, at 253 (“Does a dictionary hinder the growth of language? Does it not rather help, by making the growth more symmetrical? The relation of the dictionary to language is not very unlike the relation of a code to the law.”).

like a dictionary definition or one of the Ten Commandments. Indeed, code advocates often invoked the example of the Ten Commandments: the *Albany Law Journal* editorialized that "God wrote down His laws, and on stone, at that."¹⁵⁸ Like a definition or commandment, the law could be written in abstract form and arrayed logically.

Code proponents argued that the answer to a legal question had to be capable of being stated as a general principle. Thus, Field argued to the Philadelphia Law Academy:

Suppose the members of this well-equipped academy were to take for a thesis one of the most important decisions upon your common law, and formulate the rule of law there discussed and applied. If you can do it, the rule so formulated can stand in a code; if you can not formulate it, the case is valueless as authority for any future case.¹⁵⁹

To be a principle, law must be capable of being announced before a dispute arose.¹⁶⁰ These principles were "higher in logical rank than deduction or example."¹⁶¹ Cases were merely sources of these principles, "merely so much bran to aid digestion" in the *Albany Law Journal's* memorable phrase.¹⁶² Cases "are not to be recognized at all, except as illustrating a principle" and "are not themselves authoritative expositions of the law."¹⁶³ Indeed, code proponents saw each case as a separate answer awaiting a question:

The common law is estimated to consist of 2,000,000 rules. Each rule is complete in itself, and bears only casual relation to any other. But a code is not hodge-podge. It is a systematic statement of those multitudinous rules, and in it each part is related to every other.

A code, therefore, was a collection of right answers stated as general principles that could solve legal problems. The courts' role was to

158. *Current Topics*, 23 ALB. L.J. 241, 241 (Mar. 26, 1881); see also *Mr. Field Closes the Debate*, *supra* note 12, at 309 (quoting Field as claiming that if the New York City Bar Association had been asked to comment on the Ten Commandments they would have said: "How badly written they are! We will refer them too [sic] committee for amendment.' 'Thou shalt not bear false witness against thy neighbor.' Why against your neighbor? Do you mean that you may bear false witness against everybody else except your neighbor?").

159. FIELD, *Law Academy*, *supra* note 76, at 250.

160. See *id.* at 255 ("But that only is truly law which has been provided beforehand. The suitor, whose case is to be adjudged, should have been able to know, before he acted, how to conform his acts to the law—that is, to the known law.").

161. *The Civil Code of the State of New York* (pt. 1), 2 ALB. L.J. 385, 385 (Nov. 19, 1870). This was the idea behind the case method introduced by Christopher Columbus Langdell at Harvard Law School in 1870, where Carter had trained. See WIECEK, *supra* note 10, at 92-93.

162. *The Civil Code of the State of New York* (pt. 2), *supra* note 102, at 408.

163. *Id.* at 409.

apply the law to the facts, not to articulate the law:

Arguments of particular points, even of law and not of fact, are arguments on facts, and not on the expansiveness of laws or of their natural relations to one another, but only on their relation to facts and to the particular state of facts in the case before the court. A and B, plaintiff and defendant, are not like X and Y in algebra, representatives of classes, of the characteristics of which many deductions can be made. No! The facts in each case admit of no deduction. It is only the law involved in these facts that admits of such ratiocinative development.¹⁶⁴

Indeed, code proponents argued both sides of the existence of right answers. If the common law provided right answers, there was no harm in writing those answers down; if not, settling a contested issue could only improve the law. Typical of the code proponents' views are those of an 1886 "correspondent" to the *Albany Law Journal*, identified as "[a] leading lawyer of one of the large cities of this State."¹⁶⁵ The unidentified correspondent, who claimed not to be familiar enough with the proposed code to have a position on its particulars, put it thus:

The matter, as I understand it, may be stated in this way: Suppose that twelve of the most eminent lawyers in the State were asked certain questions in common law. If they agreed on their answers, why could they not reduce the answer to writing? If the answers could be reduced to writing why could they not be put in the form of a statute and enacted? If on the other hand the twelve failed to agree on their answers, what sort of a common law is that in regard to which the most learned expounders are at variance? And wouldn't it be well to wipe out the differences of opinion by some 'uncommon law,' printed in books, and sanctioned by the Legislature of the State.¹⁶⁶

While code proponents believed that there were and ought to be right answers to legal questions, they saw two problems with the common law that prevented it from providing these right answers. First, the common law's answers were hard to find because they required searching through hundreds or thousands of judicial opinions.¹⁶⁷ Second, the common law often failed to provide a certain answer to a legal question because precedents conflicted. The *Albany Law Journal*, for example, criticized a code opponent who sat on the appellate bench by noting the number of reversals, divided opinions, etc., produced by the New York courts and asking "Now, under such

164. *The Civil Code of the State of New York* (pt. 3), 2 ALB. L.J. 450, 450 (Dec. 10, 1870).

165. *Current Topics*, 33 ALB. L.J. 221, 221 (Mar. 20, 1886).

166. *Id.*

167. See *supra* notes 85-91 and accompanying text.

a system, we may well inquire, what is the law?"¹⁶⁸

Such a question missed an essential point for code opponents—the courts' function was not to find out the rules of law in that sense but to apply the law to facts.¹⁶⁹ Conflicting precedents need not signal conflict over the law but could indicate a potentially important distinction based on differing facts. Code opponents rejected the claim that the common law was hard to decipher. Carter, for example, argued:

Do we find any considerable difficulty when a client comes to us and asks us what his rights are in reference to this subject or that, when it turns upon what the unwritten law is, do we find any difficulty in telling him his rights, and advising him? Not ordinarily. Of course, there are, and will be to the end of time, some difficult questions and many novel cases upon which men cannot agree, and upon which litigation will arise; but in general, I ask, how is it? Now, gentlemen, I say that our unwritten law (I mean that of our country and England) upon all the principal questions relating to the private transactions of men with each other, is in a higher state and in a better condition than that of any jurisprudence in the world.¹⁷⁰

Indeed, code opponents argued that not only did the common law provide right answers but that codes were incapable of providing such answers to private law questions. Carter, for example, argued:

What occasions the most difficulty? Is it statutes, or is it the unwritten law? You have only to consult your books of reports to settle that question. You can take up any volume of reports that you please of the Court of Appeals, and I think you will find that a majority of decisions turn upon questions, not relating to the unwritten law, but upon questions relating to the statutory law; and when you consider that the questions relating to statutory law govern only a very small part, comparatively, of the transactions of mankind, you will see that the proportion is vastly magnified.¹⁷¹

Statutory law had its place in public law and a limited role in introducing innovations into private law, they argued, but it was incapable of resolving legal questions concerning the great mass of daily interactions among individuals.¹⁷²

168. *Current Topics*, 25 ALB. L.J. 241, 242 (Apr. 1, 1882).

169. See MATHEWS, *supra* note 39, at 16-17.

170. CARTER, TESTIMONY, *supra* note 142, at 17.

171. *Id.* at 18-19.

172. See CARTER, PROPOSED CODIFICATION, *supra* note 13, at 18-19. The distinction between public law and private law issues was important to the code opponents', particularly James C. Carter's, view of how the law answered legal questions. Carter accepted the role of statutes in "the whole administrative system of the State," criminal law, "mere social and political questions" where the only issue was the will of the majority, where "sharp changes" in the law were required by changed conditions, and to settle the requirements of formalities. *Id.* at

Indeed, code opponents dismissed Field's draft as "a *useless thing*."¹⁷³ If it really did contain what Field claimed it did, Carter argued,

do you suppose that the lawyers of the State would have failed for twenty years to find out the fact that our law just as it exists could be found out in this one volume of 400 or 500 pages? If there is a good book published, is there any failure on the part of lawyers to find it out? Why, they are snapped up the moment they appear. We all, every one of us, buy two or three hundred dollars' worth of books every year Why if this thing were what it pretends to be; if it were a correct statement in writing of the law as it purports to be, and as it is asserted that it is, it would have been the greatest speculation that this generation has seen to publish it; the presses of the country could not have supplied the demand for it; every lawyer would have had half-a-dozen copies, one at his house, and others at his office, and another in his trunk; waking or sleeping he would not have been without it; it would have been a necessity to have it with him.¹⁷⁴

A code could not answer a legal question because it divorced principle from fact. Commenting on earlier testimony by Field, James C. Carter addressed this issue in his 1887 testimony to the New York Senate Judiciary Committee:

The gentleman [Field] said to you that he turned to a man very distinguished at the Bar of this State and asked him, "Don't you think that [a particular code provision] is the law; isn't that the law?" Well, he looked at it and said, "Yes, it is the law, but it is very misleading." . . . Well, are we to state the law in misleading terms? What greater mischief can be done than to put in statutory form a statement of the law which, although it may be held not to be incorrect, is nevertheless calculated to mislead? Everything in any statute purporting to declare the law which is in any degree misleading is almost as bad as if it were distinctly erroneous; it is the next thing to error, and in all its consequences is just about as pernicious.¹⁷⁵

For the code opponents, only principles and facts together could constitute law.

At the root of the disagreement was a dispute over what law was.

17-18. The appropriate sphere for the unwritten law embraced "the rights, obligations and duties in respect both of person and property which arise from the ordinary dealings and relations of men with each other, so far as it is not expedient for the considerations above stated to make them the subject of statutory enactment." *Id.* at 20.

173. CARTER, TESTIMONY, *supra* note 142, at 21.

174. *Id.* at 20-21; *see also* CARTER, PROPOSED CODIFICATION, *supra* note 13, at 97. Somewhat snippishly, Carter went on to relate the one instance of citation of the code in a court of which he was aware, when he used it against Field in a case. *See* CARTER, TESTIMONY, *supra* note 142, at 21.

175. CARTER, TESTIMONY, *supra* note 142, at 10.

The code opponents saw the unwritten law as “the recognized will of that community wherein it prevails, based upon its notions of natural justice, good morals, and good policy, as gradually evolved by custom and precedent, or limited by written laws.”¹⁷⁶ Written laws, on the other hand, “are the mandate of the supreme legislative power of a State.”¹⁷⁷ Code proponents, on the other hand, recognized only definitive written statements as law and preferred that those receive democratic legitimacy from the legislative process.

CONCLUSION

What can we take away from the American codification debate for consideration of legal argument today? First, the code opponents’ vision of the common law is largely lost from the American legal system today. In legal education, casebooks emphasize discontinuities in the law, not the coherence of a system of rules. One need not accept the nineteenth-century notion of the common law’s “divine significance”¹⁷⁸ to see case law as something more than “merely so much bran to aid digestion.”¹⁷⁹ In the courtroom, judges and lawyers alike seem to view the common law only as an endlessly expanding catalogue of causes of action rather than a system of internally consistent rules containing limits as well. All too often public policy arguments, and usually not very good ones at that, dominate legal analysis in both briefs and opinions. Recapturing a shared sense of the common law as a system of rules that, at least, is striving toward internal consistency would be a step toward curing these problems.

Second, the idea of a limit to the appropriate scope of statutory law is also absent from most debates about law today. Statutes and administrative regulations increasingly dominate the legal landscape. Not only does such dominance threaten the survival of the common law (and personal freedom as most of the statutory incursions are into private law) but modern statutes rarely exhibit any of the codifiers’ concern with systematization of the law. Instead of creating a coherent framework for resolving similar issues, statutes today employ ad hoc approaches, treating each problem as distinct.¹⁸⁰ Policy

176. MATHEWS, *supra* note 39, at 10.

177. *Id.*

178. Thomas M. Cooley, *The Uncertainty of the Law*, 22 AM. L. REV. 347, 367 (1888).

179. *The Civil Code of the State of New York* (pt. 2), *supra* note 102, at 408.

180. Consider state and federal laws regulating employment. Each jurisdiction has tens, if not hundreds, of statutes regulating different aspects of employment, from insurance provisions to protecting employees from discharge for serving on juries or voting. See, e.g., JAMES O.

arguments over how to deal with particular societal issues thus are devoid of a legal dimension and the interests of the system as a system are ignored.

We should care about these changes for reasons beyond the substantive changes in the law that accompany them. (We should care about those too, but political differences may dictate which of the substantive changes we care about.) It matters not just what societal goals our legal system sets out to accomplish but how the legal system does so. The law is not simply a tool in a social planner's kit, but part of the fabric of our society. The common law gives a vital flexibility to that fabric. In its 1837 report on codification, the Story Commission described the common law as

not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form, which fall within the letter of the language, in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usages of the country. There are certain fundamental maxims in it, which are never departed from; there are others again, which, though true in a general sense, are at the same time susceptible of modifications and exceptions, to prevent them from doing manifest wrong and injury.¹⁸¹

A healthy legal system with a significant common law component can help society adapt to changing conditions and produce solutions whose outlines are beyond our immediate knowledge.¹⁸²

Moreover, the common law provides a means of social dialogue noticeably absent from public discourse today. Legal argument within the common law ultimately rests on persuasive authority—a court in jurisdiction *X* should follow a precedent from jurisdiction *Y* or distinguish its own precedent in a new case because a party has persuaded it that it has the better argument based on principle. Because such a conversation must occur each time a new case arises, the possibilities for legislative logrolling are greatly reduced.

CASTAGNERA, KENNETH A. SPRANG, PATRICK J. CILON, & ANDREW P. MORRIS, *TERMINATION OF EMPLOYMENT: EMPLOYER AND EMPLOYEE RIGHTS* (1999). These laws contain inconsistent provisions on multiple issues, from the definition of key terms to the administrative requirements for bringing claims, subjecting employees and employers alike to considerable uncertainty.

181. STORY et al., *supra* note 26, at 702.

182. See e.g., Paul H. Rubin, *Growing a Legal System in the Post-Communist Economies*, 27 CORNELL INT'L L.J. 1 (1994).

Revisiting the nineteenth-century American codification debate offers the opportunity to consider these types of issues. This debate marshalled a high degree of legal intellect in a dispute that touched on many issues at the core of how lawyers regarded the law and themselves. Regardless of whether one is ultimately persuaded by the proponents or opponents, a modern reader can find much of value in the debate as well as enjoy the rhetorical skills of some of the nineteenth century's greatest legal advocates.

